SUPREME COURT, U. S.

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FILED
DEC 16 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 843

LEE ROY LEACH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. S. Moore
200 Petroleum Building
Jackson, Mississippi 39201
Attorney for Petitioner

E. L. Mendenhall, Inc., 926 Cherry Street, Kansas City, Mo. 64106. HArrison 1-8080

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INTRODUCTORY STATEMENT

The petitioner, Lee Roy Leach, respectfully petitions for a writ of certiorari to review a judgment and order made by the Court of Appeals for the Fifth Circuit not yet reported, but styled, "Lee Roy Leach v. United States", affirming a judgment against the petitioner made and entered by the United States District Court for the Northern District of Mississippi, Eastern Division, on October 6, 1967.

The opinion of the Court of Appeals is appended and bound with this petition.

This case was decided by the United States Court of Appeals for the Fifth Circuit on October 17, 1968, and judgment was entered that date. The petitioner did not receive notice that his case had been affirmed until November 12, 1968. Associate Justice Black extended the time within which to file a petition for a writ of certiorari to December 16, 1968, without prejudice to the Court's consideration of whether the application had been timely presented. An affidavit justifying untimely filing, with supporting documents, has been filed with this Court for its consideration.

A Multilith Record was filed with the Court of Appeals for the Fifth Circuit and a certified copy of the Multilith Record, and a certified copy of the proceedings in the Court of Appeals for the Fifth Circuit has been filed. All references herein to the record are to the Multilith Record.

JURISDICTIONAL STATEMENT

Petitioner believes this Court has jurisdiction to review the decision by writ of certiorari by virtue of *28 USC 1954 (1)*.

QUESTION PRESENTED FOR REVIEW

1. Was the petitioner prejudiced by the failure of the trial court to grant a mistrial as to him at the close of the government's case, and after the trial court (a) sustained a motion for judgment of acquittal as to both defendants to the conspiracy count, (b) sustained a motion for judgment of acquittal as to petitioner on two of three substantive counts, (c) overruled an alleged co-conspirator's motion for judgment of acquittal to four substantive counts and (d) granted a mistrial as to the alleged co-conspirator?

STATUTES INVOLVED

This case involves *26 USC 5604 (a) (1)* and *Rules 8 (b)* and *14, Federal Rules of Criminal Procedure,* the full text of which are appended and bound with this petition.

STATEMENT OF THE CASE

The petitioner was jointly indicted with James Nathan Thrasher in a seven count indictment. Count One charged a conspiracy between the petitioner and Thrasher; Count Two charged petitioner with a substantive offense; Count Three charged the petitioner and Thrasher jointly with a substantive offense; Counts Four, Five and Six charged Thrasher only with substantive offenses; and Count Seven charged the petitioner with a substantive offense. Motions for severance were timely made by petitioner and Thrasher prior to the trial of the case (R. 366 and 368), and the motions were overruled (R. 368).

The petitioner and Thrasher were put to trial jointly on the seven count indictment. At the close of the government's case, motions for judgment of acquittal were made on behalf of petitioner and Thrasher on all counts of the indictment. The motions were sustained as to the conspiracy count as to both defendants; the motions were sustained as to Counts Three and Seven as to the petitioner; the motion was overruled as to Count Two against the petitioner; and the motion was overruled as to four counts standing against Thrasher. The petitioner and Thrasher then renewed their motion for severance and moved for mistrials. The trial court sustained the motion for a mistrial as to Thrasher and overruled as to the petitioner. The trial then proceeded against the petitioner

on Count Two of the indictment, which was a charge of the possession of non-tax paid liquor.

The government's evidence against the petitioner and Thrasher was presented almost entirely by the same witnesses, Mack Parkes and Earle Morris. The testimony of those two witnesses was interweaved in the sense that the line of questioning and testimony went back and forth from one defendant to the other. There were numerous references to the location of petitioner's property in relation to a still site (R. 54, 71, 72 and 118). There was testimony by an expert witness attempting to link the petitioner to the still (R. 207, 208).

The witness Parks testified that on February 3, 1967, he raided a still which was about one-half mile from the petitioner's home. Earle Morris testified that he made a seizure of a still a distance of about half a mile from the petitioner's premises (R. 118). The witness Morris also testified that he caught Thrasher at a still, finding a rubberized overall which Thrasher was wearing matching a rubberized coat found at the still, and also found paper bags on Thrasher's person which matched paper bags found at the still, where Thrasher gave a false name (R. 133, 134, 135, 152, 153 and 146).

The only testimony in the record from which a jury could find guilt of the petitioner was the testimony of the witnesses Parkes and Thompson (R. 51, 53 and 91) that the petitioner had made statements to them that someone stole whiskey belonging to the petitioner, which was denied by the petitioner (R. 278, 279); the testimony of Earle Morris that Morris found liquor stashes near petitioner's property; and the testimony of Morris that paths led from petitioner's property to the stashes (R. 132-135). All of this was reasonably explained by the petitioner (R. 282-284).

REASONS FOR GRANTING THE WRIT

The decision rendered by the Court of Appeals for the Fifth Circuit is, with deference, in conflict with *Schaffer* v. *United States,* 362 U.S. 511. This case involves an important question of Federal law which should be settled by this Court, under its general supervisory powers.

ARGUMENT

1. Was the petitioner prejudiced by the failure of the trial court to grant a mistrial as to him at the close of the government's case, and after the trial court (a) sustained a motion for judgment of acquittal as to both defendants to the conspiracy count, (b) sustained a motion for judgment of acquittal as to petitioner on two of three substantive counts, (c) overruled an alleged co-conspirator's motion for judgment of acquittal to four substantive counts, and (d) granted a mistrial as to the alleged co-conspirator?

Schaffer v. *United States,* 362 U.S. 511, was a five-to-four decision. Mr. Justice Clark delivered the opinion of the Court, with whom Mr. Justice Frankfurter, Mr. Justice Harlan, Mr. Justice Whittaker and Mr. Justice Stewart concurred. Mr. Justice Douglas delivered the dissenting opinion, with whom the Chief Justice, Mr. Justice Black and Mr. Justice Brennan concurred. Conspiracy was put to new dangerous uses much more in this case than in the *Schaffer* case. In *Schaffer,* there was a criminal connection proved between all of the defendants and the Stracuzza brothers, who were the common center of the schemed transport stolen goods, but the brothers did deal with the other co-conspirators

individually, and thus all could be linked to the Stracuzza brothers. The majority held there was sufficient proof in *Schaffer* of the participation of all the defendants in the overall operation of the scheme through their dealings with the Stracuzza brothers, and there was no prejudice arising from the defendants being tried together on the substantive counts of the indictment, which applied individually to each of the defendants. In this case, there is nothing in this record to connect petitioner and Thrasher, and hence no conceivable, legitimate reason why petitioner's case should have been submitted to a jury which had heard anything more than admissible evidence against the petitioner alone.

It is no answer that the severance at the conclusion of the government's case cured this error, for the petitioner was entitled to no less than a completely unbiased jury to decide his case solely on the evidence against him, rather than a jury whose minds had to be purged or biased by the trial court, which was impossible under these circumstances. The trial court was at pains to give appropriate cautionary instructions. The question is whether these cautionary instructions were sufficient. The Court of Appeals held that they were sufficient.

The petitioner moved for severance at the earliest opportunity, renewed his motion at every opportunity, moved the trial court for a mistrial and moved the Court for a new trial after conviction. The petitioner gave the trial court every conceivable opportunity to cure the error.

In arguing against severance, the United States Attorney stated (R. 261-262) that the government acted in good faith in jointly indicting the two defendants for conspiracy, but admitted that after further interview of

witnesses and consideration of a search, the government did not put on the witnesses to two of the overt acts charged in the indictment. This petitioner should not be denied a basic constitutional right to a fair trial because the government had not been diligent prior to indictment or trial in determining whether the government had a conspiracy case. To do so would be to reward the government for its lack of diligence at the expense of the petitioner. The strained construction of *Schaffer* has resulted in an accused's right to a fair trial depending upon the fair-mindedness of the prosecutor more than any other single fact. *Schaffer* has been distorted to mean that if the government joins two persons in the same indictment who are totally and unconnected strangers charged with totally and unconnected offenses, the accused cannot complain if the trial court takes pains to give appropriate cautionary instructions.

There are other authorities concerning these questions, noteworthy of which are *Ward* v. *United States,* 289 F.2d 877 (C.A. D.C., 1961); and *United States* v. *Goss,* 329 F.2d 180 (C.A. 4, 1964). The petitioner, however, bases his petition on this Court's interpretation of *Schaffer,* which petitioner, with deference, submits is contrary to the interpretation placed thereon by the United States Court of Appeals for the Fifth Circuit in this case.

CONCLUSION

Petitioner respectfully submits that a review of the record would indicate that this petition for a writ of certiorari should be granted, and that the judgment of the Circuit Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Northern District of Mississippi, should be set aside, the

judgment of conviction reversed and this cause remanded for a new trial.

Respectfully submitted,

W. S. MOORE
200 Petroleum Building
Jackson, Mississippi 39201
Counsel for Petitioner